IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Writ Petition No.6462 of 2004

Mrs.Kausalyadevi Balmukund Gupta Petitioner
Vs.
Mr.Lachand Gupta & anr. Respondents

Mr.A.M.Joshi for petitioner.
Ms.Rajeshri Sawant h/f. Mr.V.J.Kale for respondents.

CORAM: B.H.MARLAPALLE,J.

July 31, 2006.

P.C.

. Heard Mr.Joshi, the learned counsel for the petitioner-plaintiff. Rule. Respondents waive service.

. As the petition challenges the interlocutory orders passed in Special Civil Suit No.13 of 1994, the petition is taken up for final hearing forthwith.

. The plaintiff moved two separate applications at Exhibits 58 and 59 before the learned Civil Judge, Senior Division at Pune on 11/2/2004 and 21/2/2004 respectively. The application at Exhibit 58 was filed under Order VI Rule 17 of CPC seeking amendment to the plaint whereas the application at Exhibit 59 was filed under Order XXIII Rule 3 of CPC for the deletion of defendant no.1 with liberty to the

plaintiff to institute a fresh suit in the Small Causes Court at Pune for recovery of the rental compensation of the plaintiff's share in the suit property. Application at Exhibit 58 has been rejected by the learned Judge of the trial Court by order dated 10/4/2004 and application at Exhibit 59 has been allowed by order dated 16/4/2004 respectively. The defendants have filed affidavit-in-reply and opposed this petition.

. The learned Judge of the trial Court rejected the application at Exhibit 58 for amendment mainly on the following reasoning:

> "...There is only question of determination of share. Thereby the plaintiff is having 1/4th share or having 1/3rd share in the suit property. But the ground mentioned by the plaintiff that she came to know about the names of joint purchaser after getting certified copy of registered sale deed, is not believable because she must have been knowing from the date of the purchase transaction took place in the year 1975 and now she has applied after 10 years for insertion of the names of

joint purchasers or deletion of the name of defendant no.1 as a tenant in order to facilitate the suit against the defendant no.1 in the small cause court. In view of the recent amendment under Order 6, Rule 17 of Civil Procedure Code, the plaintiff has not shown the due diligence that she could not have raised the matter before commencement of the trial. By filing the claim affidavit at Exh. 38 the trial is already commence since 18/11/2002 and in such circumstances, I could not find any substance in the application."

. If regards be had to the plaint, the plaintiff very clearly stated that her late husband had in joint ownership of defendant no.1 purchased the suit property but she was not aware the exact share and she claimed that she was the sole owner of the suit property and that she did not know the details of the transaction. In the application at Exhibit 15 the plaintiff stated that on 1/11/2003 she obtained a certified copy of the sale deed in respect of the suit property purchased jointly and she noted that the said purchase was by four individuals and

defendant no.1 was not a party to the said transaction whereas his wife, defendant no.2 was one of the purchasers along with three others including the plaintiff. The applications at Exhibits 58 and 59 were filed on 11/2/2004 and 21/2/2004 respectively as noted hereinabove and, therefore, these applications did not suffer from any delays if we take into consideration the date on which the plaintiff was able to obtain certified true copy of the registered sale deed i.e. 1/11/2003. The applications were moved within about three and half months period and even if the trial of the suit had commenced, it was necessary for the trial Court to allow the amendment passed on a copy of the registered sale deed. The reasoning given by the trial Court totally defeats the cause of the plaintiff and the trial Court ought to have noted that the plaintiff was a housewife who did not know about the nature of the transactions which were mainly done by her late husband and the defendant no.1. The application at Exhibit 59 has been partly allowed by the following order:

"Application at Exh. 59 is partly allowed and the plaintiff is permitted to withdraw the

claim against defendant no.1 unconditionally. The liberty to institute the fresh suit is always with the plaintiff but she is not permitted to file a fresh suit on the same cause of action."

. Consequent to the orders passed below Exhibits 59 and 58 Special Civil Suit No.13 of 1994 would continue only against defendant no.2 and at the exclusion of of the other two purchasers i.e. Mrs.Sarojkumari Devkinandan Gupta and Mr.Devkinandan Sitaram Gupta. With the exclusion of these two purchasers the right of the plaintiff over the suit property and her exact share and also the prayer for partition cannot be decided. Thus Mrs.Sarojkumari Devkinandan Gupta and Mr.Devkinandan Sitaram Gupta are the necessary parties to be impleaded as the additional defendants in the said suit. The order permitting deletion of defendant no.1 does not call for any interference but at the same time the plaintiff's right to file appropriate proceedings before the Small Causes Court cannot be taken away by the said order and in fact they have not been taken away. Therefore, the order passed below Exhibit 59 does not call for any interference at the hands of

this Court with the clarification already given.

. Hence the petition is partly allowed and the order dated 10/4/2004 passed below Exhibit 58 is hereby quashed and set aside. The application at Exhibit 58 thus stands allowed and the petitioner - plaintiff shall carry out the amendment to the plaint within a period of two weeks from today. The trial of Special Civil Suit No.13 of 1994 shall be completed as expeditiously as possible and in any case by 31st March 2007.

. Rule made absolute accordingly with no order as to costs. Writ to go forthwith.

(B.H.MARLAPALLE,J.)